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No. 95-1225

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,
Petitioner,

v.

MARIAN BROCKAMP, Administrator
of the Estate of Stanley B. McGill, *et al.*,
Respondents.

**On Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* VINCENT P. TASSINARI IN SUPPORT OF PETITION FOR WRIT OF CERTIFICATION

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, Vincent P. Tassinari respectfully moves this Court for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certorari. Because this motion and the attached brief are filed within the time allowed for filing a brief in opposition to the petition for a writ of certiorari (Sunday, May 12, 1996), this motion and the attached brief are timely under Rule 37.2. This motion and brief has been served on all separately represented parties per Rule 29.3 and proof of service filed with the Clerk. In addition, forty copies of this motion and brief with cream color covers are filed with the Clerk.

The original written consent of Petitioner United States addressed to counsel for the *amicus* indicating such consent is filed with the Clerk. In a phone conversation with Respondent Scott on May 1, 1996, Respondent Scott orally agreed to give his consent after receiving a copy of the attached brief. Respondent *Scott* and Respondent *Brockamp* have declined written consent.

• Nature of Applicant's Interest •

It has been said that a true *amicus curiae* is without interest in litigation in which the *amicus* brief appears and is but "bystander" whose mission is to aid the court and to act only for personal benefit of court. *Kline v Weaver*, 348 SW2d 379 (CA Texas 1961). *Amicus* Vincent P. Tassinari ("Tassinari") earned a bachelor's degree in mechanical engineering from Purdue University in Indiana in 1986, has

seven years experience as a professional engineer, and is presently a graduate law student in the LL.M. (Tax) program at Golden Gate University School of Law in San Francisco, California. He submits this brief through his next best friend, counsel of record, representing no institution, group, or association. Although Tassinari supports the petition, Tassinari supports neither party on the merits. His sole interest is the development of the law in the area of equitable tolling, particularly as it relates to tax refunds. As such, *amicus* finds himself in the unique position of supporting the United State's petition for a writ of certiorari, in opposition to the respondents' position, and supporting the affirmance of the Ninth Circuits holding in favor of the respondents, in opposition to the petitioner's position.

In addressing whether Congress intended to exclude the doctrine of equitable tolling timeliness provisions of 26 USC 6511, Tassinari approached this tax question as an impartial outsider under an exercise of scholarly analysis. Because the context in which Tassinari approached this issue is necessarily divergent from the goals of the opposing parties, Tassinari is in a position to both view this issue in a different perspective and to emphasize special matters relating to such a perspective, thereby serving as a true friend of the Court.

• Particular Value of this Brief •

In particular, Tassinari's *amicus* brief will be of value to the Court because:

- this brief cites two Eleventh Circuit cases that are highly relevant to that circuits position on equitable tolling that are not cited by Petitioner United States. (See, footnotes 3 and 5 of *amicus* brief).
- this brief offers views counter to the petitioner's for the holdings in *Vintilla, Dalm, Oropallo, Webb,* and *Git;*
- this brief analyzes, in detail, legislative intent to find that Congress did not intend to exclude the doctrine of equitable tolling from I.R.C. §6511 and equitably tolling the time limits of §6511 will not conflict with §6511's purpose or intent;
- this brief helps to project the potential, far reaching legal impact of affirming the Ninth Circuit's holding in *Brockamp;*
- and, this brief helps to project the minimum fiscal impact of affirming the Ninth Circuit's holding in *Brockamp.*

• Conclusion •

For the above reasons, *amicus* respectfully requests that his motion for leave to file the attached brief be granted.

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*

The interest of Vincent P. Tassinari as *amicus curiae* is set forth in the preceding motion for leave to file this brief.

SUMMARY OF ARGUMENT

Since the passage of the Supreme Court case of *Irwin v. Veterans Affairs* on October 1, 1990, five circuit courts have addressed the issue of whether Congress intended to exclude the doctrine of equitable tolling from the time periods of 26 U.S.C. §6511(a).[1] Because there is a conflict on this issue between the position of the First and Fourth Circuit and the position of the Ninth Circuit, this Court should grant a writ of certiorari so that the treatment afforded to taxpayers who claim an equitable tolling of the statutory limitations upon tax refunds will not differ "based solely upon geographic happenstance." Because Congress did not intend to exclude the equitable tolling doctrine from §6511 and equitably tolling the time limits of §6511 will not conflict with §6511's purpose or intent, *Brockamp's* conclusion, that the statute of limitations provided in §6511 may be equitably tolled, should be affirmed by this Court.

Although upholding *Brockamp's* conclusion may open "the flood gates of litigation," the fiscal impact of such a holding will be limited.

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[1] **May 22, 1991**: *Vintilla v. United States*, 931 F.2d 1444 (11th Cir. 1991); **May 24, 1993**: *Oropallo v. United States*, 994 F.2d 25 (1st Cir. 1993); **October 2, 1995**: *Welch v. United States*, 66 F.3d 691 (4th Cir. 1995); **October 5, 1995**: *Brockamp v. United States*, 67 F.3d 260 (9th Cir. 1995); **January 4, 1996**: *Git v. United States*, 1996 U.S. App. LEXIS 86 (8th Cir. 1996) (unpublished).

Because of page limitation on this brief, discussion of the 11th, 8th, 1st, and 4th Circuits positions will be summarized below from *Amicus'* LL.M. (Tax) thesis. *Amicus* will supply the reader of this brief a copy of this thesis upon request.

The **11th Circuit's** holding in *Vintilla v. United States* and its progeny indicate that the holding in *Vintilla* was specific to Mr. and Mrs. Vintilla and not a general holding that the Eleventh Circuit interpreted *Dalm* to mean that 'the doctrine of equitable tolling does not apply to tax refund suits.' For example, in *Mutual Assurance v. United States*[2], the Eleventh Circuit cited *Vintilla* for the proposition that "a taxpayer who fails to file an administrative claim for refund within the period set forth in I.R.C. § 6511(a) is barred from filing a refund suit in the district courts."[3] In *Ryan v. United States*[4], the court cited *Vintilla* for the proposition that "a taxpayer may not sue the United States for a tax refund until it first files a refund claim with the government."[5] Among other reasons, because neither *Mutual Assurance* nor *Ryan* cited *Vintilla* for the proposition that "equity could not toll the

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[2] *Mutual Assurance v. United States*, 56 F.3d 1353 (11th Cir. 1995).

[3] *Mutual Assurance*, 56 F.3d at 1356. Although this case was available July 3, 1995, the Petitioner United States failed to cite this case on point as authority in its January 31, 1996 petition to this Court.

[4] *Ryan v. United States*, 64 F.3d 1516 (11th Cir. 1995).

[5] *Ryan*, 64 F.3d at 1520-21. In addition to failing to address the *Mutual Assurance* case, the Petitioner United States failed to cite this case on point as authority in its January 31, 1996 petition to this Court. This *Ryan* case was available on September 26, 1995, four months prior to the United States petition.

limitations period," it is unlikely that the *Vintilla* equity holding extended beyond Mr. and Mrs. Vintilla.

The **Court's** own holding in *United States v. Dalm*[6] indicates that the primary goal in *Dalm* was to further elaborate on the jurisdiction element of equitable recoupment in light of *Bull v. United States*[7] and its progeny, not to create a holding on the issue of equitable tolling of refund suits. Further, the tax judicial doctrine of equitable recoupment and the tax judicial doctrine of equitable tolling are two completely different tax doctrines.

Similar in its position to that of the 11th Circuit, the **8th Circuit's** holding in the unpublished opinion of *Git v. United* States indicates that this issue is still open in that circuit.

The **1st Circuit's** holding in *Oropallo v. United States* - equitable tolling does not apply to §6511 time limitations - does not hold up under close scrutiny for four reasons. First, the courts general "analogy to *Lampf*" argument did not account for "the context" upon which the *Lampf* conclusions were dependent. Second, *Oropallo's* analogy of §6511(a) to §9(e)'s 1-year time limitation did not account for the fact that the 1-year limit of §9(e) already incorporated principles of equity. Third, the court's analogy of §6511(b)(2)(A) to §9(e)'s 3-year outside limit is based upon circular logic. And last, the court over emphasized the legal weight given to statutory captions.

The **4th Circuits** holding in *Webb v. United States* - equitable tolling must already apply in a particular action against private defendants before the *Irwin* presumption can be applied to government defendants - and its conclusion -

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[6] *United States v. Dalm*, 494 U.S. 596 (1990).

[7] *Bull v. United States*, 295 U.S. 247 (1935).

Internal Revenue Code tax refund suits are excluded from the rebuttable presumption in *Irwin* - misread the **purpose** of the *Irwin* holding in suits against the government and, as a result, confused the **general rule** of *Irwin* with the **effect** of the *Irwin* holding in Title VII suits.

ARGUMENT

I. APPLICATION OF THE IRWIN PRESUMPTION TO THE TIME LIMITS OF §6511(a)

a. Introduction: Congressional Waiver of Sovereign Immunity in Tax Refund Cases

If Congress had never established a mechanism by which taxpayers could claim refunds against the government, the government would be completely immune from such suits under the doctrine of sovereign immunity.[8] This was the state of tax refund law prior to 1911. At that time, a taxpayer could only bring an assumpsit refund action against the tax collector personally, rather than against the United States government, to obtain a refund.[9] However, in 1911, Congress waived this complete immunity when it

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[8] Sovereign immunity prevents a federal court from exercising subject matter jurisdiction over suits against the government. *United States v. Shaw*, 309 U.S. 495, 500-01 (1940). See also, *United States v. Testan*, 424 U.S. 392, 399 (1976); *Library of Congress v. Shaw*, 478 U.S. 310, 315 (1986).

[9] *United States v. Williams*, 115 S. Ct. 1611; 1995 U.S. LEXIS 3036, *11 (1995)(citing *Ferguson, Jurisdictional Problems in Federal Tax Controversies*, 48 Iowa L. Rev. 312, 327 (1963).).

enacted the predecessor to §1346(a)(1) of Title 28.[10] Section 1346(a)(1) grants the district courts general jurisdiction over suits against the United States "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected."[11] However, §1346(a)(1) must be read in conformity with other statutory provisions which qualify a taxpayer's right to bring a refund suit.[12] Two such statutory provisions are §6511(a) and §7422(a) of Title 26.[13]

Section 6511(a) provides that "claim for credit or refund of an overpayment of any tax imposed by this title [26] in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed ...". Section 7422(a) provides that "no suit ... shall be maintained ... for the recovery of any internal revenue tax ... until a claim for refund or credit has been duly filed ... according to the provisions of law ... and the regulations ...". One such provision of law was set out in the 1946 Supreme Court case of *Holmberg v. Armbrecht*.[14]

In *Holmberg*, the Court held that, to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations, provided the application is done in conjunction

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[10] 28 USC 1346 was based on a consolidation of Revenue Acts, the first Act being March 3, 1911, ch 231, §24, para. 20, 36 Stat. 1093. These acts were originally contained in the former 28 USC §§ 41(20), 931(a) and 932.

[11] 28 USC 1346(a)(1) (1995).

[12] *Dalm*, 494 U.S. at 601.

[13] *Dalm*, 494 U.S. at 601-602.

[14] *Holmberg v. Armbrecht*, 327 U.S. 392 (1946).

with the legislative scheme.[15] Nineteen years later, in the 1965 case of *Burnett v. New York Central Railroad*[16], the Court adopted the congressional intent analysis in equitable tolling cases.[17]

In the 1990 case of *Irwin v. Veterans Affairs*[18], the Court again reiterated its position on assessing legislative intent when it comes to interpreting statutory time limits as being subject to the doctrine of equitable tolling. In *Irwin*, the Court's express purpose was to "adopt a more general rule to govern the applicability of equitable tolling in suits against the Government" because prior Supreme Court cases "dealing with the effect of time limits in suits against the Government [were] not entirely consistent."[19]

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[15] *Holmberg*, 327 U.S. at 401.

[16] *Burnett v. New York Central R.R.*, 380 U.S. 424 (1965).

[17] *Burnett*, 380 U.S. at 432, 436 (Thereby disapproving of the use of the jurisdictional-substantive-procedural tricostate skeletal analysis to determine whether a statutory time limitation may be tolled.).

[18] *Irwin v. Veterans Affairs*, 498 U.S. 89 (1990).

[19] *Irwin*, 498 U.S. at 94-95. One possibility for this inconsistency is the emphasis alternatively sent from two lines of Supreme Court cases that have developed from the 1955 case of *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). ***Dalm***: "Although we should not construe a time-bar provision unduly restrictively, we must be careful not to interpret it in a manner that would extend the waiver beyond that which Congress intended." *Dalm*, 494 U.S. at 608(quoting *Block v. North Dakota*, 461 U.S. 273, 287 (1983))(quoting *United States v. Kubrick*, 444 U.S. 111, 117-118 (1979))(referring to *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955))("Of course, when dealing with a

b. Rule for Determining Whether the Equitable Tolling Doctrine Applies to a Particular Statute

The *Irwin* Court's general rule was developed and set out as follows. "A waiver of sovereign immunity cannot be implied but must be unequivocally expressed."[20] However, "the time limits imposed by Congress in a suit against the Government involve a waiver of sovereign immunity."[21] The Court therefore held as follows. Time requirements in statutes are customarily subject to the equitable tolling doctrine.[22] Once Congress has made a waiver of sovereign

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statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction."). ***Irwin***: "We must be careful not to assume the authority to narrow the waiver that Congress intended, or to construe the waiver 'unduly restrictively'." *Irwin*, 498 U.S. at 94 (quoting *Bowen v. City of New York*, 476 U.S. 467, 479 (1986))(quoting *United States v. Kubrick*, 444 U.S. 111, 118 (1979))(referring to *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955))("Neither should [this Court,] as a self-constituted guardian of the Treasury[,] import immunity back into a statute designed to limit it.").

[20] *Irwin*, 498 U.S. at 95.

[21] *Irwin*, 498 U.S. at 96.

[22] **This is known as the '*Irwin* presumption'**. The original finding in *Irwin* read "time requirements in [statutes cited in] lawsuits *between private litigants* are customarily subject to [the] equitable tolling [doctrine]." *Irwin*, 498 U.S. at 95 (emphasis added). The Supreme Court removed the internal quotation "between private litigants" from this *Irwin* finding in the *Lampf* case. *Lampf v. Gilbertson*, 501 U.S. 350, 363 (1991). The removal of this internal quotation can only mean that the *Irwin* tolling

immunity by providing for such time limits, the court must assess legislative intent to determine whether the statutory limitation period is subject to the doctrine of equitable tolling.[23] One realistic assessment[24] of legislative intent in

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principle also applies unconditionally to statutes which allow a private litigant plaintiff to sue a federal government defendant. This contradicts the *Webb* court's conclusion that the Irwin presumption does not apply towards statutes that only permit lawsuits against a federal government defendant. In the *Webb* opinion, the Fourth Circuit cited this same phrase from *Lampf* as though the Fourth Circuit themselves omitted the internal quotations. See *Webb*, 66 F.3d at 699 ('internal quotations omitted').

[23] *Irwin*, 498 U.S. at 95. This 'legislative intent analysis' is required in order to rebut the presumption that time requirements in statutes are customarily subject to equitable tolling. The *Lampf* Court engaged in such an analysis, citing as authority *Irwin's* finding that "time requirements in [statutes] ... are customarily subject to equitable tolling." *Lampf*, 501 U.S. at 363. At present, some district courts avoid this step by claiming that time limit statutes are "jurisdictional" and thus may not be tolled. This Court's *Brockamp* holding would be a good means to reiterate the Court's disapproval of the conclusory "jurisdictional" method of analysis.

[24] The *Irwin* Court's use of the words "... a realistic assessment ..." invites the obvious conclusion that this is but one means to assess legislative intent. See, *Irwin*, 498 U.S. at 95. The *Webb* court was able to use the language of *Irwin* to interpret the holding in *Irwin* to meant that *the only way* the *Irwin* presumption can be applied against a government defendant is if equitable tolling already exists in a particular action against

determining whether Congress has rebutted the equitable tolling presumption for the statutory limitation period in question is that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States."[25] Congress, of course, may provide that the statutory time limits are not subject to the doctrine of equitable tolling, if it wishes to do so.[26]

c. Applying *Irwin* to Determine Whether the Statute §6511(a) is Subject to the Equitable Tolling Doctrine

Merely by enacting time limits for a tax refund suit against the Government, Congress waived the Government's sovereign immunity in such a suit back in 1911.[27] These time limits in §6511(a) will be subject to the doctrine of equitable

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private defendants. *Webb*, 66 F.3d at 697. However, the fact that a statute is already subject to the doctrine of equitable tolling in an action against private defendants is merely one means of realistically assessing legislative intent as to whether the *Irwin* presumption can be applied towards a statute and thus against a government defendant.

[25] *Irwin*, 498 U.S. at 95.

[26] The sentence "Congress, of course, may provide 'otherwise' if it wishes to do so" is consistent with the *Irwin* Court's use of the permissive phrase "... should also apply ..." in its holding. See, *Irwin*, 498 U.S. at 96. The only two logical options in which Congress can "provide otherwise" with respect to equitable tolling are to entirely bar the doctrine from the statutory limitation period or to limit the grounds on which equity will apply to the claimant.

[27] *Irwin*, 498 U.S. at 96. See also, Footnote 10, this brief.

tolling unless Congress has provided otherwise.[28] In *Webb*, the Fourth Circuit correctly pointed out that "tax refund suits are always brought against the government, never against private parties."[29] Thus, because there can not be a rebuttable presumption of equitable tolling applicable to suits against private defendants under §6511(a), the useful principle of interpretation set out in *Irwin* is not useful to interpret legislative intent for this particular statute. Therefore, we still need to analyze legislative intent.

To determine whether Congress has intended to exclude §6511(a) from the doctrine of equitable tolling, we must look at the statutory language, purpose and legislative history. One Circuit court which has dealt with the meaning of §6511(a) with respect to equitable tolling is the Ninth Circuit. In *Brockamp v. United States*[30], the Ninth Circuit conclude that, based on the *Irwin* presumption, the doctrine of equitable tolling applies to tax refund suits under §6511(a). The court analyzed whether Congress intended to exclude equitable tolling from §6511 and found that:

> "Congress has never expressed any intention that equitable tolling should not apply to §6511.[31] The specific language of the statute does not speak to the application of equitable tolling

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[28] *Irwin*, 498 U.S. at 95.

[29] *Webb*, 66 F.3d at 698.

[30] *Brockamp v. United States*, 67 F.3d 260 (9th Cir. 1995).

[31] *Amicus'* own exhaustive search only turn up Congressional Record -- House, H.R. Rep. No. 133, 100th Cong., 1st Sess. 189 (Dec. 1, 1987)(Congressional waiver of §6511(b) overpayment limit for the estate of Commodore Perry Miller).

principles.[32] Additionally, since the Supreme Court decided *Irwin* four years ago, Congress has done nothing to indicate that equitable tolling does not apply to §6511. Furthermore, as the court in *Johnsen v. United States* noted, the legislative history of §6511 "is absolutely devoid of any indications that Congress intended to preclude such equitable tolling in tax refund actions." 758 F.Supp. 834, 835-6 (EDNY 1991), quoted in *Scott v. United States*, 795 F.Supp. 1028 (D. Haw. 1992).[33] We hold that in the absence of congressional action that indicates to the contrary, the statute of limitations provided in §6511 may be equitably tolled."[34]

Although Congress did not intend to exclude the equitable tolling doctrine from §6511, absent this Congressional intent, we still must ask whether equitably tolling the time limits of §6511 would conflict with §6511's

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[32] This is contrary to the 1-year period of §9(e) in *Lampf*, where the statutory language "one year *after* the discovery" incorporates principles of equity in the statutory language, thus making tolling unnecessary. *Lampf*, 501 U.S. at 363. Cf., *Oropallo*, 994 F.2d at 30 (§6511(a) analogous to §9(e)'s 1-year period.).

[33] See, H.R. Rep. No. 1337, 83rd Cong., 2 Sess., reprinted in 1954 U.S. Code Cong. & Admin. News 4563; S. Rep. No. 1622, 83rd Cong., 2 Sess., reprinted in 1954 U.S. Code Cong. & Admin. News 5235.

[34] *Brockamp*, 67 F.3d at 262(italics and footnotes supplied).

purpose or intent.[35] Generally, the time schemes set out in §6511 incorporate by reference the time period of §6511(a). In particular, the 3-year period of §6511(b)(2)(A) is prescribed by §6511(a).[36] Thus, if a court finds that the equitable grounds exist to toll the 3-year period of §6511(a), then the 3-year period of §6511(b)(2)(A) would likewise be tolled[37] and the timely filed claim would be subject to §6511(b)(2)(A).[38] The main legislative intent question comes down to this: if this Court finds that the doctrine of equitable tolling applies to §6511(a) in all cases, what significance will §6511(b)(2)(A) have, in a subsequent case, where a court finds that the grounds for equitable tolling exists?

First we need to understand the present significance of §6511(b)(2)(A). By the language of §6511(b)(2)(A), this subsection operates to limit the AMOUNT of credit or refund available for a timely filed claim. But the language of §6511(b)(2)(A) gives no indication as to why or under what circumstances Congress intended to limit the AMOUNT of credit or refund. Thus, for the present significance of

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[35] Whether "... the application is done in conjunction with the legislative scheme." *Holmberg*, 327 U.S. at 401. Also see Footnote 15, this brief.

[36] *Comm'r v. Lundy*, 116 S. Ct. 647, 1996 U.S. LEXIS 694, *9.

[37] *Lundy*, 1996 U.S. LEXIS at *9. The time limits for the §6511(b)(1) filing deadline would similarly be affected by the time limits of §6511(a).

[38] Thus, *Scott II* correctly found that "§6511(b)(2)(A) in no way prevents the bringing of a lawsuit." *Scott v. United States*, 847 F.Supp. 1499, 1505 (D. Haw. 1993)("*Scott II*").

§6511(b)(2)(A), we need to look at Congress's intent.[39] The 6th, 9th and 10th Circuits have found that Congress's intent in passing §6511(b)(2)(A) was to prevent a taxpayer from "reviving a stale refund claim" by intentionally making an overpayment for one tax year and then filing a new refund claim for the entire overpayment.[40]

Next, we need to understand what it means if this Court finds that the doctrine of equitable tolling applies to §6511(a). If this Court finds that the doctrine of equitable tolling applies to §6511(a), then the time periods listed in §6511(b)(2)(A) would also be affected because §6511(b)(2)(A) incorporates §6511(a)'s time limit by

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[39] *Kelly v. Robinson*, 479 U.S. 36, 43 (1986). Statutory language is rarely so clear as to make totally irrelevant the legislative purpose or history.

[40] "In order that a late payment of a small portion of the tax due may not extend the time for filing a claim for refund of the entire tax, a limitation has been inserted by the committee restricting the amount of a credit or refund to the portion of the tax paid during the four [now three] years immediately preceding the filing of the claim." S. Rep. No. 398, 68th Cong., 1st Sess. 33 (1924)(act established the predecessor of §6511(b)(2)(A))(as quoted in *Lee v. United States*, 1995 U.S. App. LEXIS 27156, *9 (6th Cir. 1995). See, also , *Brockamp*, 67 F.3d at 265-266(dissent quoting *Snyder v. United States*, 616 F.2d 1187, 1188 (10th Cir. 1980)); *Fogel v. United States*, 1995 U.S. Dist. LEXIS 13686, *4 (WDWI 1995). Thus, unlike the three year period in *Lampf*, the three-year period of §6511(b)(2)(A), in the context of a tax refund suit, has significance other than imposing an "outside limit". Cf., *Oropallo*, 994 F.2d at 27-8 (holding §6511(b)(2)(A)'s legislative significance can only be as an "outside limit".).

reference.[41] Also, under such a finding, a court would have subject matter jurisdiction as a court of equity to hear the grounds for equitable tolling in the case before that court.[42] In addition, even if there is a general rule that states that the doctrine of equitable tolling applies to §6511(a) in all cases, a taxpayer would still need to prove that the taxpayer's situation satisfies the narrow grounds for equitable tolling on a case by case basis in order to then be heard on the merits of the taxpayer's tax refund claim.[43]

If the taxpayer fails to satisfy the grounds for equitable tolling, then the taxpayer will not be entitled to present the merits of the taxpayer's case for a refund claim because the 3-year period of §6511(a) will have run. In this situation - where the grounds for equitable tolling do not exist and the 3-year period has run - the court lacks subject matter jurisdiction under §1346(a) to hear the claim for refund and the taxpayer will be barred from obtaining a refund. Here, §6511(b)(2)(A) will have its same present significance -

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[41] Thus, there is no merit to the *Oropallo* court's claim that §6511(b) establishes an additional limitations period, separate from the three year time limitation period in §6511(a). See, *Oropallo*, 994 F.2d at 27.

[42] The equitable tolling doctrine is read into every federal statute of limitations, and the decision whether the doctrine should be applied lies within the sound discretion of the court. *Holmberg*, 327 U.S. at 398; *Conley v. Gibson*, 355 U.S. 41 (1957). Because the applicability of the grounds for equitable tolling often depends on matters outside the pleadings, it "is not generally amenable to resolution on a Rule 12(b)(6) motion." *Cervantes v. San Diego*, 5 F.3d 1273, 1276 (9th Cir. 1993).

[43] *Irwin*, 498 U.S. at 96.

preventing a taxpayer from obtaining a refund by reviving a stale refund claim through a series of two or more overpayments.

In the situation of a taxpayer who meets the narrow grounds of equitable tolling, the 3-year period is stopped from running by the grounds for equitable tolling, even if the date on which the statute of limitations begins to run has passed.[44] Any refund claim filed within a reasonable time[45] after the equitable period has lapsed[46] would be timely under §6511(a) and timely under all other time limits which incorporate by reference §6511(a), including §6511(b)(2)(A). Because such a refund claim would be timely, the claim is duly filed under 26 USC 7422(a) and thus the court will

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[44] *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990)(Posner, J.). This case has a very good discussion of equitable tolling and equitable estoppel. Cf. with *Vintilla, First Alabama Bank v. United States*, 981 F.2d 1226 (11th Cir. 1993) and *Rosser v. United States*, 9 F.3d 1519 (11th Cir. 1993)(fusing the doctrines of equitable tolling and estoppel.).

[45] This reasonable time after the lapse of the equitable period allows for the necessary closure of these refund claims. See, *Cada*, 920 F.2d at 453 (Posner, J.)(discussing the pros and cons between a rule of automatic extension and a rule of reasonable time for closure of a claim.).

[46] In *Cada*, the 7th Circuit held that "a plaintiff who invokes equitable tolling to suspend the statute of limitations must bring suit within a reasonable time after he has obtained, or by due diligence could have obtained, the necessary information." *Cada*, 920 F.2d at 453. Under §6511(a), a taxpayer is judge by the taxpayer's capability to act by filing or paying, not to discover. However, this is an immaterial distinction.

have subject matter jurisdiction under 28 USC 1346(a) to hear this timely claim for refund.[47] In addition, for such a taxpayer, there is no reason to believe that this taxpayer could defeat the present significance of §6511(b)(2)(A) by maintain the level of intent necessary to intentionally revive a stale refund claim by intentionally making a second overpayment.[48]

Thus, in situations of equitable tolling where the grounds of equitable tolling are present, Congress's intention behind §6511(b)(2)(A) is still met both because the claim would be timely, not stale, and because the same inability to file a refund claim during the equitable period would prevent the taxpayer from alternatively scheming to intentionally revive "a stale refund claim."

Thus, §6511(b)(2)(A) will still serve its present purpose if this Court finds that the doctrine of equitable tolling applies to §6511(a) and taxpayers meet the grounds for equitable tolling in subsequent cases. Because the legislative intent behind §6511(b)(2)(A) is still maintained even if the grounds for equitable tolling stop the 3-year period of §6511(a), Congress could not have intended to exclude the

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[47] *Lundy*, 1996 U.S. LEXIS at *11. (Timely filing of a refund claim is a jurisdictional prerequisite to bringing suit in a United States Court of Federal Claims or United States District Court.).

[48] *Scott II*, 847 F.Supp. at 1506(stating that a mentally incompetent taxpayer "will not necessarily be able to evaluate a tax return to determine whether a right to an overpayment exists."). Even if such a mentally incompetent taxpayer somehow managed to submit a claim for refund prior to the tolling period, it remains open as to the legal ramifications for such a taxpayer who signs that refund claim under the penalty of perjury.

time limits of §6511(a) from the doctrine of equitable tolling by limiting the AMOUNT of credit or refund under §6511(b)(2). Given the limited and specific purpose of §6511(b)(2)'s time barrier, it is more likely that Congress intended to allow for other reasons, such as equitable tolling, to toll refund claim time limits.

d. Conclusion that the Doctrine of Equitable Tolling Applies to the Tax Refund Statute §6511(a)

Because Congress did not intend to exclude the equitable tolling doctrine from §6511 and equitably tolling the time limits of §6511 will not conflict with §6511's purpose or intent, *Brockamp's* conclusion, that the statute of limitations provided in §6511 may be equitably tolled, should be affirmed by this Court.

II. PROJECTED LEGAL AND FISCAL IMPACT OF AFFIRMING *BROCKAMP*

a. Impact on the Judiciary

A finding by this Court that §6511(a) is subject to the doctrine of equitable tolling should not be viewed lightly. Equitably tolling the limitation periods for filing refund claims could ultimately affect, among other variegated Code timeliness provisions, §6511(a)(credit/refund limitations); §6511(b)(1)-(b)(2) (allowance of credit/refund limitations); §6511(c)(1) (extensions of time by agreement); §6511(d)(1) (bad debts and worthless securities); §6511(d)(2) (net operating loss and capital loss carrybacks); §6511(d)(3) (foreign tax credit); §6511(d)(4) (business credit carryback); §6511(d)(5) (self-employment tax); §6511(d)(6) (income recaptured under qualified plan termination (ERISA)); §6511(g) (partnership items of partnerships covered by

unified proceeding rules); §2011(c) (state death tax credits); §2014(e) (foreign death tax credits); §2015 (death tax on reversionary interests or remainders in property credits); §6013(b)(2)(B) (joint returns after filing separately); or §6696(d)(2) (preparer penalties).

Other Code statutory deadlines that may be affected by equitable tolling include §6213 (Tax Court petition after issue of deficiency notice); §6226 (Tax Court, Court of Federal Claims, or district court petition after notice of final partnership administrative adjustment (FPAA)); §6228 (petition to Tax Court, Court of Federal Claims, or district court after denial of a tax matters partner's admin. request); §6703 (district court determination of promoter & frivolous return penalties); §7426 (wrongful levy third-party suits); or §7429 (judicial review of jeopardy assessments).

Such a holding may also impact the three tax judicial doctrines relating to periods of limitations (recoupment[49], setoff, and estoppel) and the tax mitigation provisions of IRC §§1311-1314.

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[49] For example, if the plaintiff in *Dalm* successfully argued to equitably toll the time limits for the recoupment's time barred main action (instead of unsuccessfully arguing that equitable recoupment can be the sole basis for jurisdiction of the time barred ancillary action), a refund claim filed within the equitable tolling period would be timely, and thus jurisdictional for the main action. And, in a daisy chain fashion, recoupment from the now timely main action would create jurisdiction for the ancillary claim. Equitable tolling could also directly toll the time limits of the ancillary action as well, if the equitable period existed for that amount of time.

b. Impact on the Public Fisc

Outside of the judiciary's own budget, the fiscal impact of a finding by this Court that §6511(a) is subject to the doctrine of equitable tolling will be limited due to the narrow grounds of equitable tolling, *Irwin*, 498 U.S. at 457, and the fact that the loss of such revenue is unbudgeted, *Webb*, 66 F.3d at 703 (dissent).

CONCLUSION

For the foregoing reasons, *amicus* respectfully asks the Court to grant a writ of certiorari in order to find that the statutory time limits of §6511(a) are subject to the doctrine of equitable tolling.

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